

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Franklin W. Olin College of Engineering

D.T.E. 01-95

**RESPONSE OF FRANKLIN W. OLIN COLLEGE OF ENGINEERING
TO BOSTON EDISON COMPANY, d/b/a NSTAR ELECTRIC, REPLY
REGARDING ITS MOTION
FOR AN EXPEDITED ORDER TO MAINTAIN STATUS QUO ANTE**

Boston Edison Company, d/b/a NSTAR Electric (“Boston Edison” or “BECO”), has brought a Motion for an Expedited Order to Maintain *Status Quo Ante* (the “Motion”) during the pendency of this proceeding. *See* Motion, p. 1. Franklin W. Olin College of Engineering (“Olin”) timely responded by its Opposition dated February 7, 2002, pursuant to Department rules. BECO replied to that pleading by its extra-rule filing dated February 12, 2002 (the “Reply”). Olin hereby responds to the Reply of Boston Edison.¹

**I. THE "LEGAL" STATUS QUO CANNOT BE PRESUMED BY BOSTON
EDISON, BUT MUST BE DETERMINED BY THE DEPARTMENT**

BECO’s request for a “return to the status quo” cannot be granted for several reasons. First, the “status quo” sought by BECO is not the true status quo existing now, a year ago, or 10 years ago. Instead, the status quo now and at all relevant times in the past has consistently been that the only entity providing electric services to the area of Olin’s new campus was and is Wellesley Municipal Light Plant (“WMLP”). Hannabury Affidavit, ¶ 2.² BECO’s argument is thus for a fictional, hypothetical status quo based

¹ While Olin seeks to avoid the waste of resources attendant to repeated filings, numerous mistakes, inconsistencies and mischaracterizations in the BECO Reply force it to file this Further Reply. Olin nonetheless reserves its rights to object to BECO’s Reply generally as beyond the universe of filings contemplated by the Department’s rules.

² Citations to “Hannabury Affidavit” are to the Affidavit of Stephen Hannabury dated November 8, 2001, filed together with Olin’s Petition. Citations to “Hannabury 2/20/02 Affidavit” are to the Affidavit of

upon BECO's false assumption that municipal boundaries always define distribution company service areas.

It is critical in this regard that the Department not be distracted by BECO's redundant claims of violations of law as support for its effort to attain this hypothetical status quo. The issue presented to the Department is whether BECO has exclusive franchise rights to an area historically served exclusively by WMLP.³ Relevant to that issue and the issue of the status quo are the following undisputed facts:

1. BECO never served the area of Olin's new campus. Hannabury Affidavit, ¶ 2.
 2. WMLP has historically provided electric service to the exact area of Olin's new campus for security lighting purposes and historically and currently provides full electric service to permanent buildings owned by Babson in Needham within a stone's throw of the new Olin campus. *Id.*
 3. A portion of Map Hill Drive, a Babson-owned roadway with security lighting served by WMLP, was located on a portion of what is now the Olin campus. That portion of the roadway and the lighting were relocated to facilitate construction of the Olin campus. Hannabury 2/20/02 Affidavit, ¶ 1.
 4. Babson owned all the property on which Olin is building its new campus as a single contiguous parcel to which electric service was provided by WMLP.
- Olin Response to BE-1-1.

Stephen Hannabury dated February 20, 2002 and annexed to Olin's opposition to Boston Edison's motion to join Babson College as a party in this proceeding.

³ Even if the Department agrees with BECO that some violation of law exists, such violation will be so short-lived that the inquiry will be mooted immediately upon resolution of the only issue presented by Olin's Petition. Olin will either be allowed to take permanent service from WMLP or will be required to take such service from BECO within a few months of now. Thus, there is no need to delve into review of an ephemeral situation that, in any event, is akin to that of hundreds of landlords, mall owners and industrial park managers across the Commonwealth that arguably are "middlemen" between the distribution companies and the end use customers.

5. In conjunction with its sale of such real estate to Olin, Babson agreed to share various services and facilities with Olin. Olin Response to BE-1-7, Attachment BE-1-IC.
6. Olin's temporary power service is taken over lines it owns, which cross no public way and which are connected to switchgear in Wellesley. Olin Response to BE-1-5.
7. Olin's proposed permanent power service would be taken over lines it owns, which would cross no public ways and which would be connected to switchgear on its own property in Wellesley. Hannabury Affidavit, ¶¶ 5, 6.

BECO, in seeking to force Olin to switch its temporary source of electric power to BECO, is essentially seeking a summary determination of the ultimate issue here, i.e. whether Olin's new campus area is subject to BECO's exclusive franchise claims. In that context, the Department must either wait to make that determination until after the facts have been developed through hearings, or assume the facts to be as Olin alleges. Should the Department accept Olin's factual assertions (including historical and current service by WMLP to the area in question, greater ease of connection, other benefits from connecting to WMLP, and greater reliability, *see* Hannabury Affidavit, *passim*), then, given the Department's recent decision in *Massachusetts Electric Company*, D.T.E. 98-122 (2002), it is, as shown below, difficult to see any result other than rejection of BECO's request.

II. THE DEPARTMENT'S DECISION IN D.T.E. 98-122 SUPPORTS OLIN, NOT BOSTON EDISON

BECO places much reliance on, but fundamentally mistakes the import of, the Department's recent decision in *Massachusetts Electric*. That decision actually provides

strong support for Olin's position that distribution company franchise areas do not always equate to municipal boundaries, and that, where they do not, the Department must consider the interests of the customer. See Olin Opposition to Boston Edison's Motion to Maintain the *Status Quo Ante*, pp. 11-12. In *Massachusetts Electric*, the Department stated:

[T]he General Court was aware in 1997 of the patchwork quilt of service territories of the seven investor-owned electric companies and forty municipal electric boards, which had developed over a century throughout the Commonwealth. The public interest in resolving franchise boundary disputes has been a matter of occasional public dispute since the earliest decades of the electric industry. See e.g., *Weld v. Board of Gas and Electric Light Commissioners*, 197 Mass. 556, 559-60 (1908) (resolving a franchise boundary dispute that arose in 1902). Indeed, the very passage of St. 1997, c. 164, § 193, evidences awareness of this potential for dispute and the consequent need to regularize boundaries statewide. The legislative mandate to the Department was, as a result of this awareness, couched in terms that accorded the agency a measure of discretion in resolving disputes where the boundaries between service territories implicated municipal boundaries. The statute clearly envisions circumstances where cleanly following municipal boundaries may not be possible without giving rise to anomalies. MECo's interpretation of § 1B(a) is strained and constraining. The statute's wording is much more general than MECo asserts; and the statute recognizes and provides for the administrative resolution of complex factual disputes that statutory law cannot resolve in advance and in detail. Hence, it follows that the Department has discretion to depart from municipal boundaries in resolving service territory disputes, if facts and fairness so warrant.

D.T.E. 98-122 at pp. 6-7.

The ruling squarely supports Olin's position. The statutory interpretation that the Department rejected in *Massachusetts Electric* – that municipal boundaries necessarily define franchise areas – is the same interpretation that BECO urged in its Motion.

Acceptance here of BECO's argument would result in the anomaly of Babson having to sever electric service for the portion of its buildings located in Needham and take such service from BECO instead, notwithstanding that the vast majority of Babson's campus, both in Wellesley and in Needham, has historically been served by WMLP. In rejecting such a rigid interpretation of the statute, the Department recognized that resolving fairly situations such as that at hand requires consideration of the needs and concerns of the customer -- here an entity seeking not to maximize its profit, but to stretch its endowment to provide scholarship based education to deserving young students. Hannabury Affidavit, ¶ 1, Exhibit B.

Faced with the Department's square rejection of its principal contention, BECO focuses in its Reply on Olin's purchase of property in Wellesley, as if that were the only basis for the proposition that WMLP should serve Olin's new campus. In reality, the primary rationale for Olin taking power from WMLP is that WMLP has always been the sole electric service provider to this area and, accordingly, WMLP can much more efficiently provide service to Olin's new campus.

BECO attempts to distinguish the *Massachusetts Electric* decision by suggesting that, if Olin is allowed to be served by WMLP, then any new customer can choose to be served by someone other than the local distribution company. This "straw-man" argument should be rejected out of hand. First, the Department has only Olin's specific case before it, and the Department's ruling in D.T.E. 98-122 can be applied in a manner that will not open the floodgates to any and all new customers. To the extent that this case is not determined purely on its own facts (and therefore has some precedential value), and to the extent that there emerges at some point another new customer (1) who

is located on a border between a distribution company and a municipal provider, (2) whose property has historically and exclusively served by the municipal provider, and (3) who can more efficiently be served in the future by the municipal provider, then the public good is plainly served by letting that occur.

BECO may seek to equate Olin's plan to take permanent service from its own property in Wellesley with the "creative conveyancing" referenced in the D.T.E. 98-122 decision, but that effort in no way detracts from the primary rationale just articulated.⁴ At the very worst, Olin's purchase of land in Wellesley is a neutral fact that does not diminish the argument that WMLP's historical and current service to the Needham portion of Olin's new campus fully justifies permitting WMLP to continue to serve the area.⁵ Olin's relative connections (in terms of mailing address, sewer connection, etc.)⁶ to Needham and Wellesley are irrelevant to the issue of whether BECO has exclusive franchise rights along the Wellesley town line where WMLP has exclusively provided electric service for years.

III. BECO's ARGUMENTS REST ON SEVERAL MISTAKES

For the reasons set forth in its Opposition to the Joinder of Babson College (section II.B), Olin urges the Department to reject BECO's assertions regarding Babson's status as a distribution company or an entity selling electricity. Any characteristics of either are merely incidental to Babson's true and only status as an educational institution,

⁴ Of course, based on then-existing precedent, acquisition of such property was a fact supporting Olin's taking service from WMLP.

⁵ Taking service on land owned in the adjacent service territory was a factor in the most recent pertinent Department precedent before the recent decision in D.T.E. 98-122. See *Ecological Fibers*, D.P.U. 85-71 (1985).

⁶ BECO's reference to limited, transitional tax payments to Needham is characteristically misleading. In fact, Olin is a tax-exempt institution that provides scholarship based education to deserving students, and therefore is no longer taxed by Needham at all.

providing a temporary accommodation to a sister institution to whom it sold extensive property.

BECO also asserts that the mere filing of Olin's Petition amounts to a concession that BECO has exclusive franchise rights. Such an assertion again wanders into the realm of fiction, because Olin took care to assert that it believed that no such exclusive franchise rights applied to the area of the new campus and that it sought the Department approval for cautionary purposes to satisfy WMLP only. Olin Petition, ¶ 3.

Finally, BECO's visions of grand conspiracies ("elaborate plan to take temporary service") and assertions of stark admissions of construction of permanent facilities are profoundly misplaced. A couple of e-mails between engineers about operational matters, combined with prudent consideration of the need for Department approval, hardly make for an "elaborate plan." As to construction of permanent facilities, the only permanent facilities are those on the Olin campus for distribution to the Olin buildings that will be the same regardless of who ultimately supplies the power. In fact, the connection to Olin's ultimate supply of permanent electric power can occur at any of a number of points along the Olin campus distribution system. Indeed, the discovery shows that, at this juncture, not only have the permanent facilities for connection with WMLP not yet been installed, but the easement rights have not even been finalized. Olin Response to BE1-7(b).

CONCLUSION

For all the reasons set forth herein and in Olin's Opposition filed February 7, 2002, BECO's burdensome and unnecessary request to sever the temporary electric service arrangements must be rejected.

Respectfully submitted,

**FRANKLIN W. OLIN
COLLEGE OF ENGINEERING**

By its attorneys,

Eric J. Krathwohl
Robert E. Richardson
Rich May, a Professional Corporation
176 Federal Street
Boston, MA 02110
(617) 482-1360

Dated: February 20, 2002

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